

# **INTERAGENCY WORKING AGREEMENT TO**

## **Integrate Special Aquatic Resources (404) Permit Requirements into the National Environmental Policy Act and the State Environmental Policy Act Processes in the State of Washington**

### **I. APPLICABILITY**

- A. This agreement applies to all transportation construction projects in the state of Washington requiring a U. S. Army Corps of Engineers individual permit and Federal Highway Administration (FHWA) action under the National Environmental Policy Act (NEPA) and/or Washington State Department of Transportation (WSDOT) action under the State Environmental Policy Act (SEPA).
- B. Parties to this agreement are the Federal Highway Administration (FHWA), Washington Division; National Marine Fisheries Service (NMFS), Northwest Region; U. S. Army Corps of Engineers (COE), Seattle District; U. S. Environmental Protection Agency (EPA), Region 10; Fish and Wildlife Service (USFWS), Region 1; Washington State Department of Ecology (Ecology); Washington State Department of Fish & Wildlife (WDFW); and Washington State Department of Transportation (WSDOT).<sup>1</sup>
- C. Regulatory/resource agency participation in this process does not imply endorsement of all aspects of a transportation plan or project. Nothing in this agreement or its appendices is intended to diminish, modify, or otherwise affect the statutory or regulatory authorities of the agencies involved.

See Appendix A, Statutory Authorities.

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<sup>1</sup>Nothing herein is intended to conflict with current directives of any of these agencies. If the terms of this agreement are inconsistent with current directives, then those portions of this agreement that are determined to be inconsistent shall be invalid; but the remaining terms and conditions not affected by the inconsistency shall remain in full force and effect. At the first opportunity for review of the agreement, all necessary changes will be accomplished by either an amendment to this agreement or by entering into a new agreement, whichever is deemed expedient to the interest of all parties.

## II. BACKGROUND

Interagency conflicts over highway/special aquatic resource issues take place in a very complex administrative arena defined by many federal, state, and local laws, ordinances, and regulations. This has resulted in overlapping jurisdictions and some duplication of effort that cause increased cost and time delays for transportation projects.

In a May 1, 1992 agreement, the U. S. Department of Transportation, the U. S. Department of Army–Civil Works, and the U. S. Environmental Protection Agency adopted as agency policy: (1) improved interagency coordination, and (2) integration of NEPA and the Clean Water Act Section 404 procedures.

In September 1993, the (Washington State) NEPA/404 Merger Task Force was formed to write an agreement in the state of Washington to implement this national policy. After an initial meeting, the group decided to include SEPA in the merger process, because of the state requirement for SEPA to be cleared before permits are issued.

## III. NEPA/SEPA/SECTION 404 INTEGRATION

The signatories to this agreement are committed to integrating the Section 404 permit process and other related permitting and certification procedures into the National Environmental Policy Act (NEPA) and the State Environmental Policy Act (SEPA) processes at the transportation planning, programming, and project development stages. We are committed to ensuring the earliest possible consideration of environmental concerns at each of these three stages. We place a high priority on the avoidance of adverse impacts to Waters of the U. S. and Waters of the State including wetlands, other aquatic resources, and associated sensitive species, including threatened and endangered species. We recognize the need to consider non-water related impacts, and acknowledge that these environmental impacts may affect the decision on the least environmentally damaging practicable alternative (LEDPA).

Whenever avoidance of Waters of the U. S./Waters of the State is not practicable, minimization of impacts will be achieved, and unavoidable impacts will be mitigated to the extent reasonable and practicable. If the project impacts are so substantial that permits would probably be denied, the signatory agencies agree to implement conflict resolution to see if the project could be appropriately modified. We will improve interagency cooperation and consultation at all levels of government throughout the process. We will integrate compliance with the Section 404(b)(1) Guidelines and other related permitting and certification procedures with compliance with the National Environmental Policy Act and the Washington State Environmental Policy Act.

**IV. ANTICIPATED BENEFITS OF PROCESS**

The process embodied in this agreement will:

- A. Provide increased environmental protection and improve and enhance the natural resources in watersheds throughout the state.
- B. Facilitate more realistic and predictable transportation projects, schedules, and budgets.
- C. Allow better utilization of agency resources.
- D. Provide for early involvement of resource and regulatory agencies and the public in the WSDOT project scoping and development processes.
- E. Provide for joint-agency evaluation and early resolution of problems/issues.
- F. Provide for early identification and resolution of environmentally sensitive issues.
- G. Reduce duplication of efforts.
- H. Provide program continuity and a consistent statewide approach for developing projects.

**V. IMPLEMENTATION PROCEDURES**

- A. Appendices B and C outline the process for implementing this agreement among the signatory agencies.
- B. The signatory agencies, in consultation with Regional and Metropolitan Planning Organizations, will work to develop procedures within one year after signing this agreement to address NEPA/SEPA/404 issues early in the transportation systems planning process.
- C. Stormwater requirements should meet or exceed the federal, state, and local standards and policies.

Best Management Practices (BMPs) for stormwater run-off and streambank erosion control for transportation construction projects shall be consistent with the WSDOT Highway Runoff Manual as approved by Ecology, local agencies' guidelines, or EPA's Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters, whichever is more

stringent. The WSDOT Highway Runoff Manual is incorporated into this agreement by reference.

- D. Appendices D, E, F, and G are for guidance purposes only. They are intended to facilitate the implementation of this agreement.

## VI. CONCURRENCE/NONCONCURRENCE

The intent of the concurrence points in the process is to preclude the routine revisiting of decisions that have been agreed to early in the process, and encourage early substantive participation by the regulatory/resource agencies. A concurrence point is a point within the NEPA/SEPA/404 process where the transportation agency (FHWA, WSDOT) requests formal concurrence and the signatory agencies provide concurrence, nonconcurrence, or elect not to participate at that stage.

- A. Within 45 days of the receipt of the request(s), the regulatory/resource agencies will provide their comments in writing, stating concurrence or nonconcurrence for each concurrence point. Per the Endangered Species Act, these time limits do not apply to Threatened and Endangered (T&E) species lists and formal consultations. T&E species lists are to be generated within 30 days from the date a request is received. Formal consultations are required to be done within 90 to 135 calendar days and can be extended by mutual agreement beyond the 135 day deadline.

Agencies agree not to revisit previous concurrences unless there is substantial new information or substantial changes have occurred to the project, the environment, or laws and regulations.

- B. Concurrence: written determination that

1. The information to date is adequate for this stage, and
2. The project may proceed to the next stage without modification.

- C. Nonconcurrence: written determination that

1. The information to date is not adequate for this stage, or
2. The potential adverse impacts of the project are so substantial that permits would probably be denied, or
3. The project should be modified to reduce the impacts.

Signatory agencies agree to provide an explanation of the basis for nonconcurrence. Signatory agencies agree to attempt to resolve issues

causing nonconcurrence, and to try to do so informally before entering formal conflict resolution.

## **VII. CONFLICT RESOLUTION**

Conflict resolution procedures may be initiated upon request of any signatory agency. Reasons may include:

- A. Unresolved written nonconcurrence,
- B. Lack of response within agreed-upon time limits, or
- C. Substantive departure from the agreement process.

See Appendix H, Conflict Resolution.

## **VIII. AGENCY COMMITMENTS**

- A. The signatory agencies will coordinate with state and local agencies to the fullest extent possible to reduce duplication between NEPA and SEPA and other state and local requirements, unless specifically barred from doing so by some other law. Where state laws or local ordinances have Environmental Impact Statement requirements in addition to, but not in conflict with, those in NEPA, the federal agencies will cooperate in fulfilling these requirements, as well as those of federal laws, so that one process will comply with all applicable laws.

This agreement in no way obligates any signatory agency to the expenditure of agency funds.

- B. Any agency may ask to be a Cooperating Agency (including Indian tribes, federal, state, and local agencies). Cooperating Agencies will be requested to become signatories to this agreement.

See Appendix I, Responsibilities of Signatory Agencies.

- C. WSDOT will conduct meetings or otherwise inform all the signatory agencies and other potential Cooperating Agencies about forthcoming projects and projects in progress so that these agencies can plan their participation in the process for the development of individual project documents. WSDOT will conduct the meetings outlined in Appendix J, as necessary, to improve interagency coordination and timeliness. Signatory agencies can select coordination opportunities based on the extent of participation expected or needed.

See Appendix J, WSDOT Meetings.

- D. FHWA and WSDOT will be Co-Lead Agencies (unless SEPA rules identify another agency as the Lead Agency) for all federal-aid transportation projects, funded under ISTEA or Title 23, developed under this agreement (except that WSDOT may not need to participate in certain federal projects developed by FHWA's Western Federal Land Highway Division). When designated as such by the SEPA rules, WSDOT will be the Lead Agency as provided for in SEPA for projects not subject to NEPA. Signatory agencies will consider developing SEPA documents as Joint Lead Agencies. Other interested federal, state, or local agencies may be considered for Joint Lead Agency status upon request. Unless otherwise agreed in writing, FHWA will be the Federal Lead Agency responsible for supervising preparation of the environmental document.

See Appendix K, Responsibilities of the Lead Agencies.

- E. FHWA will request the participation of any federal agency for joint (FHWA/WSDOT), NEPA/SEPA projects. WSDOT will request the participation of any state agency for joint NEPA/SEPA or SEPA projects, at the earliest possible time in the process.
- F. All agencies will place a high priority on the avoidance of adverse impacts to wetlands, and to other aquatic resources and associated sensitive species, including threatened and endangered species. If a project has the potential to adversely affect wetlands or other aquatic resources requiring an individual permit under Section 404 of the Clean Water Act, avoidance alternatives will be thoroughly evaluated and selected for implementation unless they are not practicable. Whenever avoidance of impacts is not reasonable or practicable (NEPA/SEPA or 404), a range of alternatives will be evaluated to determine the apparent least environmentally damaging practicable alternative (preferred alternative).
- G. The agencies agree to use flexibility in requiring NEPA/404 alternatives analysis when resource values are low<sup>2</sup> or for projects that have the potential for only minor impacts on the aquatic environment. Application of this provision will be consistent with the joint memorandum of August 23, 1993, from EPA and the COE and Regulatory Guidance published in the Federal Register on September 10, 1993. An alternatives analysis will be required, but the level of detail and rigor of the analysis will be commensurate with the magnitude of the impact. All resources affected by the project, including those with low value, will be mitigated as stipulated in other sections or appendices of this agreement.

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<sup>2</sup>SEPA does not require an alternatives analysis unless the project would have probable significant adverse environmental impacts.

#### H. Pipeline Projects and NEPA Tiered/Programmatic Projects, SEPA Phased Environmental Review

"Pipeline projects" are defined as projects that are under development at the date of signing of this agreement, that do not yet have an approved final environmental document. These projects will be made current by attempting to complete the analyses required by earlier stages prior to proceeding to the next concurrence point. The remaining agreement integration process will then be followed. In cases where completing the prior analyses would delay the progress of the project beyond reasonable limits, signatory agencies will negotiate to determine the nature and extent of analysis necessary.

In addition, some projects are developed as "tiered/programmatic projects under NEPA and phased environment review under SEPA" in which the environmental document is phased in a more general analysis intended to address larger program or policy issues. This agreement applies to tiered/programmatic and phased environmental review projects/documents. However, the nature and extent of analysis necessary in each of these documents will be negotiated among the signatory agencies on a case-by-case basis.

#### I. Project Scoping and Budgeting Stage

The project scoping and budgeting stage is a consultation process, wherein project sponsors solicit input and comments from resource agencies.

WSDOT will prepare a Project Summary. The Project Summary contains three forms: Project Review Summary form, Design Decisions Summary, and Environmental Review Summary form.

The Project Review Summary form includes: 1) the general project identification information; 2) a statement of deficiencies/need and purpose statement; 3) a proposed strategy/criteria to evaluate practicable alternatives; and 4) the identification of sensitive resources and potential impacts.

The Design Decision Summary form contains design elements for the project. The form includes areas to describe project design criteria, roadway characteristics, structures, and anticipated design deviations.

The Environmental Review Summary form is used to describe resources within a project, as well as potential impacts caused by the project. The Environmental Review Summary form includes four parts: 1) general project identification information; 2) anticipated permits and approvals; 3) proposed type of environmental document; and 4) other supporting

information, mitigation measures, and resources to be avoided by the project.

WSDOT will provide the project summary to the resource agencies, along with an invitation to the Biennial Project Review Meetings.

WSDOT will compile a record of comments and suggested changes. These will be transmitted to the project designers for consideration in the projects.

WSDOT will use these meetings as one method for identifying potential Cooperating Agencies.

1. FHWA and WSDOT agree to:

- a. Screen documentation for Section 404 issues and for adherence to this agreement.
- b. Ensure that WSDOT-sponsored project documents are supplemented, if necessary, for adherence to this agreement before sending them for review to regulatory/resource agencies.
- c. For WSDOT-sponsored projects, include the estimated cost of avoiding, minimizing, and compensating impacts to Waters of the U. S./Waters of the State and associated sensitive species.
- d. Require all other project sponsors to:
  - (1) Supplement documents, if necessary, for adherence to the agreement before sending them for review to regulatory/resource agencies, and
  - (2) Include the estimated costs of avoiding, minimizing, and compensating impacts to Waters of the U. S./Waters of the State and associated sensitive species in the project cost of the practicable alternatives evaluated.

2. Federal and state regulatory and resource agencies agree to:

- a. Review environmental elements of project summaries as requested by FHWA and/or WSDOT.
- b. Within 45 calendar days of receipt, provide comments on purpose and need, project alternatives, impacts to Waters of the U. S./Waters of the State and associated sensitive species (including cumulative impacts to these resources), and proposed mitigation.



- c. Identify those projects that are likely to need their agency's participation in the project development stage.

#### J. Project Development Stage

All signatory agencies agree to implement Appendices B and C.

1. FHWA agrees to not approve a final EIS unless there is written preliminary agreement from the COE, after consultation with EPA, that the project appears to meet 404 (b)(1) analysis and mitigation requirements.
2. WSDOT agrees to:
  - a. Request regulatory/resource agency involvement early in the NEPA and/or SEPA process.
  - b. Provide the information necessary to identify the least environmentally damaging practicable alternative and associated proposed mitigation early in the NEPA and/or SEPA process.
3. Federal and state regulatory and resource agencies agree to:
  - a. Participate in the project development process when aquatic resource impacts are substantial.
  - b. Review, provide comments, and concur or give notice of nonconcurrence on NEPA/SEPA purpose and need, Section 404 basic and overall project purpose, criteria for alternative selection, project alternatives to be evaluated in the draft EIS, and the preferred alternative.
  - c. Respond to requests for comments and concurrence within 45 calendar days. Per the Endangered Species Act, these time limits do not apply to Threatened and Endangered (T&E) species lists and formal consultations. T&E species lists are to be generated within 30 days from date request is received. Formal consultations are required to be done within 90 to 135 calendar days and can be extended by mutual agreement beyond the 135 day deadline.

#### IX. EFFECTIVE DATE, REVISIONS, AND TERMINATION

This agreement becomes effective upon signature of all agencies and may be revised upon approval of all signatory agencies. Revisions may be proposed by one or more signatory agencies. Proposals for revisions will be circulated to

all signatory agencies for a 30-day period of review. Approval of such proposals will be indicated by written acceptance. This provision does not prevent agencies from entering into supplemental agreements to address issues of limited concern affecting only a portion of the signatory agencies.

Any party may choose to withdraw from this agreement upon 30-day notice to the other parties that have not given notice of withdrawal or termination.

**X. MONITORING/EVALUATING IMPLEMENTATION OF THE AGREEMENT**

The signatory agencies will monitor the success of the agreement process and modify it as necessary to improve it. Each signatory agency shall designate a representative to serve on a monitoring and evaluation team.

See Appendix L, Monitoring and Evaluation.

**XI. APPENDICES ATTACHED**

- A. Statutory Authorities
- B. NEPA/SEPA/404 Permit Concurrent Process for Projects Requiring an EIS
- C. NEPA/SEPA/404 Permit Concurrent Process for Projects Requiring a NEPA EA/SEPA Checklist/DNS
- D. Purpose and Need
- E. Alternatives Analysis and Aquatic Resource Avoidance Guidance for Transportation Projects
- F. Compensatory Mitigation
- G. Level of Data Needs/Threshold for Involvement
- H. Conflict Resolution
- I. Responsibilities of Signatory Agencies
- J. WSDOT Meetings
- K. Responsibilities of the Lead Agencies
- L. Monitoring and Evaluation
- M. Acronyms and Abbreviations
- N. Definitions

## Interagency Working Agreement

8/12/96

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Washington Division Administrator  
Federal Highway Administration, Region 10

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Date

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Regional Director  
National Marine Fisheries Service, Northwest Region

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Date

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Director  
Washington State Department of Ecology

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Date

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Director  
Washington State Department of Fish & Wildlife

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Date

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Secretary of Transportation  
Washington State Department of Transportation

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Date

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District Engineer  
U. S. Army Corps of Engineers, Seattle District

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Date

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Regional Administrator  
U. S. Environmental Protection Agency, Region 10

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Date

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Regional Director  
U. S. Fish and Wildlife Service, Region 1

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Date